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No. 564

Supreme Court of the United States

OCTOBER TERM, 1968

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Petitioner*,

v.

MANUEL ANTONIO VEGA Y ARMINAN, *Respondent*.

REPLY BRIEF FOR PETITIONER

JOHN G. LAYLIN
701 Union Trust Building
Washington, D. C. 20005

COTTON HOWELL
1000 First National Bank Bldg.
Miami, Florida 33131

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
WILLIAM H. ALLEN
GEORGE V. ALLEN, JR.

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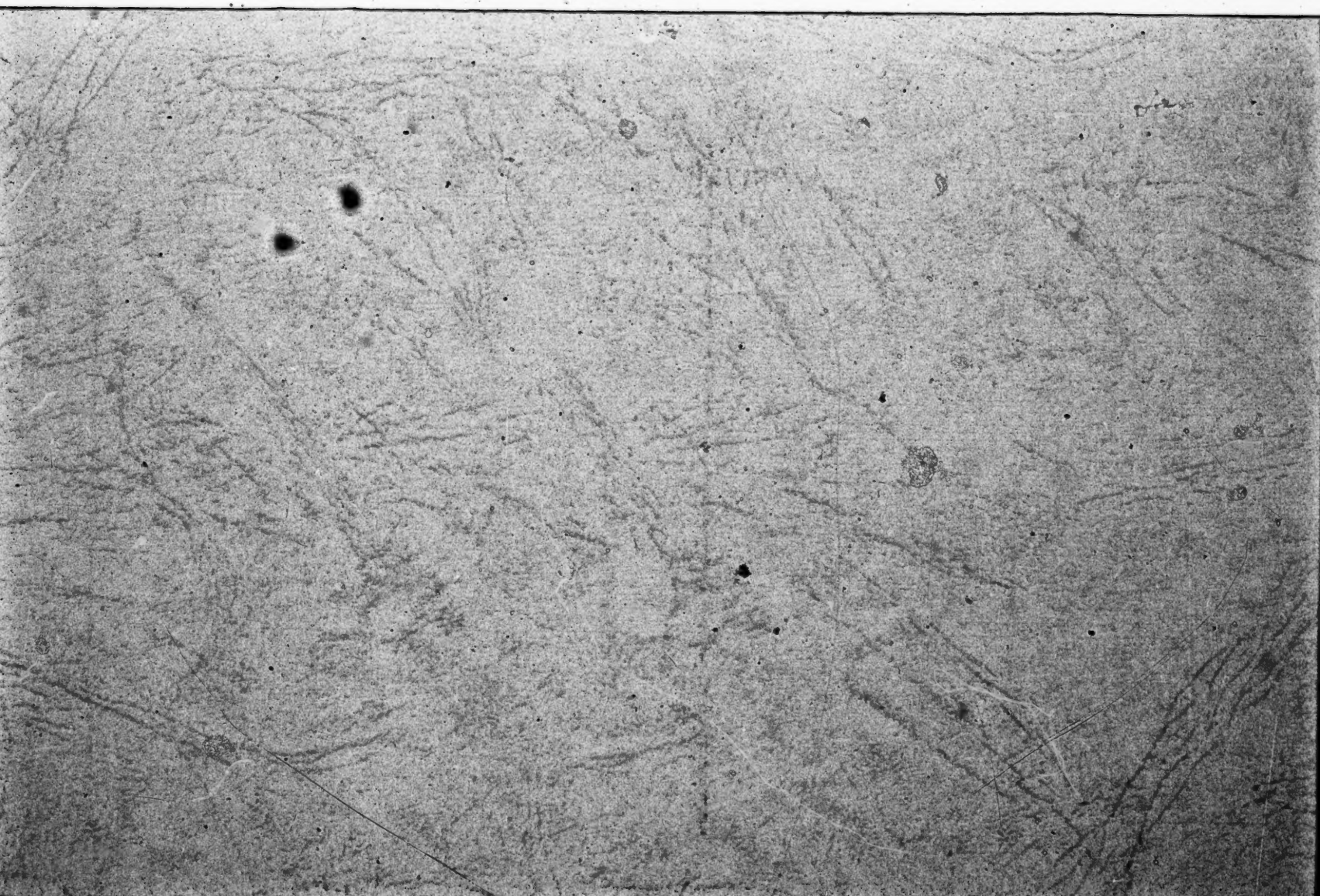

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REPLY BRIEF FOR RETITIONER

I

The point of overriding importance in this case is that the transaction involved was and remains clearly Cuban in every significant respect. It is clearly governed by Cuban law.

Respondent was a citizen and resident of Cuba when the policy was issued and delivered to him in Cuba, as he was when he applied for the policy; and he does not claim that he had previously held any other citizen-

ship or had any other residence. The policy was issued by petitioner's Havana branch, was written in the Spanish language, and it is conceded by the Florida courts that the contractual relationship which the policy embodied was "entered into in Cuba . . . ." (Pet., App. 16a.) The policy was expressly payable *only* in Havana, Cuba. After the policy was issued, respondent remained a citizen and resident of Cuba for more than 30 years and made each of his premium payments in Cuba, to petitioner's Havana branch.

Although the policy as originally written was made payable in dollars, a point stressed by respondent (Br. in Opp., pp. 2, 6-8), this fact in no sense undercuts the policy's consistent Cuban identification. Respondent did in fact request his policy to be written in one of the two Cuban domestic currencies then recognized by the laws of Cuba as legal tender in Cuba. One of these Cuban domestic currencies, and the one chosen by respondent, was the United States dollar, which at that time enjoyed this special and unusual local status. (See Pet., pp. 3-5.)*

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* Even the Florida courts did not deny, as respondent sometimes does (Br. in Opp., pp. 7-8, 11), that the basic contract is governed by Cuban law. (Pet., App. 16a-17a. See also the Florida District Court of Appeal's previous decision in Confederation Life Ass'n v. Ugalde, 151 So. 2d 315, 318 (Dist. Ct. App. 1963), *aff'd*, 164 So. 2d 1 (Fla. 1964), *cert. denied*, 379 U.S. 915.) In their decisions below the Florida courts have now purported to regard respondent's election in Florida to demand payment there of the policy's cash surrender value as an "acceptance" of an outstanding "offer" by petitioner, with the result that a new contract was deemed to have been "made" in Florida. (Pet., App. 17a-18a.) This Court long ago rejected an identical argument as a purported basis for application of forum law to an insurance transaction not properly subject to forum law. Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 399-400. "[A] state cannot

II

The present "Communistic" government of Cuba, which draws such opprobrium in respondent's brief (*e.g.*, Br. in Opp., pp. 3-4), came to power in 1959. Long before that, in 1951, laws duly enacted by an elected government of Cuba provided that the United States dollar "shall cease to be legal tender and have debt redeeming force in the territory of the Nation. . . ." Under these laws all outstanding dollar obligations payable in Cuba ("all obligations contracted and payable in the national territory") became payable after June 30, 1951 in Cuban pesos at the rate of one peso to the dollar ("through the delivery of national currency in the same amounts as those previously expressed in United States dollars"). (R. 5, pp. 46-47, 50-51.) Cuban exchange controls enacted after 1959 have made payment of respondent's policy in Cuba mandatory and have made it a criminal offense for either party to attempt to discharge an obligation under the policy outside Cuba.

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obtain control over conduct not within its jurisdiction to prescribe by the simple device of inventing a choice of law rule to be applied in the particular case for the purpose of giving effect to a rule of its own law designed to govern conduct." Restatement, *Foreign Relations Law of the United States*, § 19, *Comment d* (Proposed Official Draft, 1962).

This Court's decision in Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, relied upon by respondent (Br. in Opp., pp. 11-12), is not in point. That case involved the question of whether the forum could properly apply a forum statute of limitations in a suit based on property loss which occurred in the forum state. There was no claim that the policy, titled a "Personal Property Floater Policy (World Wide)", did not cover property loss occurring in the forum state. Since property in the forum state was clearly covered, and since loss did in fact occur in the forum state, application of the forum state's statute of limitations was obviously justified.

In large part respondent's brief consists of argument that the contractual specification of the medium of currency in which payments were to be made justified the courts below in ignoring the effects of Cuban law upon the parties' contractual relationship. But this argument cannot survive the fact that the transaction was in every significant sense a Cuban transaction, that the contract between the parties was not only concededly "entered into in Cuba" but was expressly performable *only* in Cuba, and that the Cuban laws both authorizing and requiring payment to be made in Cuban pesos were clearly a proper exercise of an inherent power possessed by every sovereign government. This is so clearly recognized in our own law as to be beyond dispute. *Guaranty Trust Co.* v. *Henwood,* 307 U.S. 247, 258-259; *Norman* v. *Baltimore & Ohio R.R. Co.,* 294 U.S. 240, 302, 307-308; *Juilliard* v. *Greenman,* 110 U.S. 421, 446-450; *Legal Tender Cases, Knox* v. *Lee* and *Parker* v. *Davis,* 79 U.S. (12 Wall.) 457, 548-549.*

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* Thus, almost a century ago, in the *Legal Tender Cases,* this Court said: "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency . . . and the obligations of the parties are, therefore, assumed with reference to that power." 79 U.S. (12 Wall.) at 549. It is "a power universally understood to belong to sovereignty . . . ." Juilliard v. Greenman, *supra* at 447.

The same power was exercised again by Congress in the Gold Clause Resolution in 1933, and was held by this Court to apply to all "domestic obligations, controlled by and to be interpreted under the law of the United States." Guaranty Trust Co. v. Henwood, *supra* at 258. There, moreover, an express contractual provision giving the creditor an option to demand payment outside the United States, in designated foreign currencies, was held ineffective to circumvent Congress' power to require that the obligation be discharged by payment of United States legal tender.

III

There is nothing "ambiguous" about the policy's place of payment provision, as respondent suggests. (Br. in Opp., p. 14.) That provision could hardly be more clear. It states unequivocally:

> "All payments within the policy, whether they be on the part of the company or the insured, will be effected in the City of Havana, Republic of Cuba, but the insured may, with the consent of the Company, make his payments elsewhere."

Neither the fact that under the terms of the original policy the company was able to "allow" the making of premium payments outside Cuba (Br. in Opp., p. 14), nor the fact that the insured was invited to seek assistance from the company at its head office or wherever it had an authorized agent (*id.*, pp. 3, 6, 14), means that the company is required to pay the insured wherever he requests payment or makes such a contact; certainly those provisions do not detract from the policy provision explicitly stating that payments of benefits would be made only in Cuba; and Cuban law now positively *forbids* the company from making any payment outside Cuba.

The fact that the policy places no restrictions on residence and travel by the insured (*ibid.*) has to do simply with the extent to which the company was willing to assume health and other hazards to which the insured's life might be subjected without an increase in premium; hence, the same clause similarly placed no restriction on the insured's occupation.

IV

The fact that the Supreme Court of Canada did not apply Cuban law in *Imperial Life Assur. Co.* v. *Casteleiro,* [1967] S.C.R. 443 (see Br. in Opp., pp. 8-11), is not dispositive of any of the issues raised in this petition. In *Casteleiro* the policy did not provide for payment in Cuba but expressly provided instead that payment would be made "by bank draft drawn on New York." The opinion does not indicate whether the company maintained assets in Cuba to cover policies thus made payable by bank draft on New York or whether the company even regarded such policies as Cuban transactions to the extent that their servicing required the continued operation of a Cuban branch. The Supreme Court of Canada refused to infer any implicit contractual requirement that the cash surrender value be paid only in Cuba and in fact construed other provisions of Mr. Casteleiro's policy to warrant an assumption by him that payments under the policy would be made in Toronto, where the company had its head office.

The *Casteleiro* decision is in fact directly in conflict with what must be respondent's position in this case. In *Casteleiro* the Supreme Court of Canada ruled that the contract was governed by Ontario law because it was "made" in Toronto. In this case the Florida courts have ruled that the contract was "entered into in Cuba", and have conceded *arguendo* that Cuban law is accordingly to be deemed the governing law of the original contract. (Pet., App. 16a-17a.) The theory advanced by the Florida courts here, that respondent's demand for the cash surrender value of the contract in Florida gave rise to a new contract governed by

Florida law, was summarily rejected by the Supreme Court of Canada in *Casteleiro,* as unprecedented and unsound.*

V

Respondent asserts that no federal question is involved.** But respondent's brief is so replete with the kind of foreign policy arguments that induced the Florida courts to refuse to apply Cuban law, including the Cuban legal tender law of 1951, as to clearly demonstrate the validity of petitioner's contentions that the Florida courts have based their action on reasons that are pertinent only to the conduct of foreign relations by the Executive Branch of the United States Government. Thus, respondent reiterates to this Court its urgings before the Florida courts that Cuban law is not to be applied because the Cuban government is "unlawful", "revolutionary", "*de facto*", "dedicated . . . to the doctrine of Communism", "tyrannical", "headed by a ruthless Communistic dictator", and given to "intimidation, coercion, arrest and imprisonment . . . ." (Br. in Opp., pp. 3-4.)

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* See also footnote, p. 2, *supra.*

** Respondent's later claim that the petition fails to satisfy Rule 23(f) of the rules of this Court (Br. in Opp., p. 16) cannot be sustained. The petition expressly states that petitioner's federal and international law arguments were raised at each stage in the lower courts' proceedings and gives citations to the record. (Pet., pp. 6-7.) Moreover, petitioner raised both the federal question and the question of international law when it moved for dismissal in the trial court on the authority of Confederation Life Ass'n v. Ugalde, *supra.* In that case the Florida Supreme Court and the District Court of Appeal specifically recognized that failure to apply Cuban law would involve the Florida courts in violations of federal constitutional law and international law.

The fact that Cuba is now in the hands of such a government has obviously worked a serious injury upon respondent, and upon other Cuban citizens who have similarly been forced to emigrate. But petitioner has suffered an injury that is no less serious. It is forbidden by Cuban law to remove any of its assets from Cuba, assets that were invested there and are held there for the purpose of meeting obligations under its Cuban policies, including this policy.* Petitioner is prohibited by Cuban law from making any payment outside Cuba on its Cuban policies, including this policy; and, if it does so, it is subject to severe penalties in Cuba, including intervention, which could amount to a confiscation of all of its assets in Cuba. (R. 5, pp. 49-51.) To require petitioner to pay this policy, and other such policies related solely to its Cuban branch operations, would not right any of the wrongs that have been perpetrated by the Castro regime in Cuba. Such a result would simply require petitioner to bear respondent's injury as well as its own. While respondent has been able to extricate himself personally from the power of the present Cuban government, petitioner in the nature of things has been unable to similarly protect itself.

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* Respondent questions the state of the record on this point (Br. in Opp., p. 5), but respondent forgets that the trial court below entered summary judgment for him. Even if petitioner had made no affirmative factual showing of any kind, it was *respondent's* duty to introduce evidence to support *his* repeated assertion that petitioner stands to be unjustly enriched by its refusal to make payment outside Cuba. The record is utterly barren of any support for such an assertion. The only evidence in the record is the sworn affidavit of an officer of petitioner indicating that petitioner was and remains fully invested in Cuba. (R. 5, pp. 55-56.)

VI

The complex of legal problems that have attended the advent of Castro in Cuba cannot be solved by treating petitioner as though it were an insurer against restrictions on the international movement of capital funds. This policy was manifestly not intended to be insurance against that kind of risk. Petitioner and respondent must both await the amelioration of conditions in Cuba. Until that occurs, petitioner's obligation is to make payments called for by the policy in Cuba in accordance with controlling Cuban law.

Moreover, to treat a policy of this sort as though it included insurance against any loss to an insured caused by restrictions on convertibility and capital movement, simply because the insurer is also subject to suit in nations less subject to currency inflation than the nation in which the policy is issued and expressly made payable, would not only be unfair to companies writing insurance on an international scale, it would operate as the strongest possible deterrent to the making of local capital investments by foreign insurance companies in the very nations that are most in need of foreign investment.

Conclusion

For the foregoing reasons, and for the reasons stated in the petition, it is respectfully submitted that the writ should be granted. In addition, because the petition raises questions that impinge critically upon the conduct of foreign relations by the Executive Branch, and because the petition raises a grave question of violation of international law by the United States, it is respectfully suggested that the Solicitor General

of the United States be requested to provide the Court with a memorandum expressing the views of the United States.

Respectfully submitted,

JOHN G. LAYLIN
701 Union Trust Building
Washington, D. C. 20005

COTTON HOWELL
1000 First National Bank Bldg.
Miami, Florida 33131

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
WILLIAM H. ALLEN
GEORGE V. ALLEN, JR.

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